1984

Utah State Coalition of Senior citizens, et al. v. Utah Power & Light Company : Brief of Appellant

Utah Supreme Court

Robert Gordon; David Lloyd; Attorneys for Defendant/Respondents.
Bruce Plenk; Utah Legal Services; Attorneys for Plaintiffs/Appellants.

IN THE SUPREME COURT
OF THE
STATE OF UTAH

UTAH STATE COALITION OF SENIOR CITIZENS, et al. Plaintiffs/Appellants, vs. UTAH POWER & LIGHT COMPANY, Defendant/Respondents.	*	Case No. 20152

APPELLANTS' BRIEF

UTAH LEGAL SERVICES, INC.
By: BRUCE PLENK
637 East 400 South
Salt Lake City, Utah 84102
Attorneys for Plaintiffs/
Appellants

ROBERT GORDON, ESQ.
DAVID LLOYD, ESQ.
P. O. Box 899
1407 W. North Temple
Suite 340
Salt Lake City, Utah 84110
Attorneys for Defendant/
Respondents

IN THE SUPREME COURT
OF THE
STATE OF UTAH

UTAH STATE COALITION OF SENIOR CITIZENS, et al. Plaintiffs/Appellants, vs. UTAH POWER & LIGHT COMPANY, Defendant/Respondents.	*	Case No. 20152

APPELLANTS' BRIEF

UTAH LEGAL SERVICES, INC.
By: BRUCE PLENK
637 East 400 South
Salt Lake City, Utah 84102
Attorneys for Plaintiffs/
Appellants

ROBERT GORDON, ESQ.
DAVID LLOYD, ESQ.
P. O. Box 899
1407 W. North Temple
Suite 340
Salt Lake City, Utah 84110
Attorneys for Defendant/
Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IN THE SUPREME COURT
OF THE
STATE OF UTAH

UTAH STATE COALITION OF SENIOR CITIZENS, et al. Plaintiffs/Appellants, vs. UTAH POWER & LIGHT COMPANY, Defendant/Respondents.	*	APPELLANTS' BRIEF Case No. 20152

STATEMENT OF THE CASE

This is an action to recover attorneys' fees for consumer participation in a case before the Utah Public Service Commission, pursuant to the Public Utility Regulatory Policies Act (PURPA) 16 U.S.C. §§2631, 2632.

DISPOSITION IN LOWER COURT

The Third District Court for Salt Lake County, Honorable David B. Dee presiding, granted Defendant's Motion for Summary Judgment and denied Plaintiffs' Motion for Summary Judgment.

DISPOSITION SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment below.

STATEMENT OF FACTS

On November 26, 1979, Plaintiffs and others submitted a Petition to the Utah Public Service Commission (PSC) (Case No. 79-999-02) requesting a prohibition on all involuntary terminations of utility service during winter months and requesting rulemaking proceedings to establish rules regarding winter termination of utility service by all utilities under the jurisdiction of the PSC. (R. 2,3,7 and Transcript before the Public Service Commission (hereafter Tr.) at 4-8). On December 17, 18 and 19, 1979, hearings were held and evidence presented on this matter (Tr. 1-503 passim).

On January 17, 1980, the PSC issued its Report and Interim Order denying Plaintiff's Petition but awarding as relief certain modifications to the Utah Residential Utility Service Regulations (URUSR) sought by Plaintiffs' witnesses. (R. 72-79). By the terms of this Order, the parties met and attempted to resolve differences regarding permanent changes to URUSR. The PSC considered these proposals and on April 18, 1980, issued a draft of proposed rules for incorporating the Interim Order. Further hearings were held to consider these proposed rules on April 21, August 13, and August 25, 1980. (Tr. Aug. 13, 1980, p. 1-151; Aug. 25, 1980, p. 152-254).

On February 19, 1981, the PSC issued its Order Adopting Regulations, including many of the revisions to URUSR proposed by

Plaintiffs. (R. 83-104). On May 4, 1981, the PSC Issued an Amendment to Order Adopting Regulations, clarifying the relationship of the regulations previously adopted to the standards set out in the Public Utility Regulatory Policies Act. (R. 105-106) On May 25, 1982, Plaintiffs requested the PSC award them attorneys' fees based on 16 U.S.C. §2632. On July 13, 1982, the PSC denied the Motion as untimely filed. (R. 107-109). During the hearings before the PSC, the Committee of Consumer Services was represented by counsel but called no witnesses, made no argument, and submitted no motions. These facts were uncontroverted below.

ARGUMENT

I. A CIVIL ACTION FOR INTERVENOR COMPENSATION IS AUTHORIZED UNDER PURPA WHEN THE STATE HAS NOT ESTABLISHED AN "ALTERNATIVE MEANS" WHICH SATISFIES THE REQUIREMENTS OF PURPA AND THE STATE UTILITY COMMISSION DOES NOT MAKE DIRECT AWARDS TO CONSUMER INTERVENORS.

In 1978, Congress provided consumers the federal right to intervene and participate in state utility proceedings to consider standards established by the Public Utility Regulatory Policies Act, 16 U.S.C. §§2631, 2632. It also provided for compensation for consumer intervenors who "substantially contribute" to the state utility commission's final determinations on PURPA standards, such as termination of service.

A civil action for intervenor compensation, such as this case, is one of three procedures Congress established in

PURPA to reimburse eligible consumer intervenors for the reasonable costs of their participation in state PURPA proceedings. Here Plaintiffs were such intervenors in just such a PURPA proceeding. The three procedures are: (1) direct awards made by the utility commission which are paid by the electric utility, §2632(a)(2)(B); (2) a civil action against the utility brought by an eligible intervenor in the appropriate state court, §2632(a)(2); or (3) a state-sponsored "alternative means" program which assures representation of consumers and provides intervenor compensation to eligible consumers to assure their participation in PURPA-related proceedings, §2632(b). Although PURPA does not mandate which of the three mechanisms the state must adopt, it does specify that the absence of a state-sponsored "alternative means" program triggers the obligation that eligible intervenors must be compensated through either civil awards or direct awards. Utah has no such alternative means.

PURPA's intervenor compensation options are set out as follows:

> 16 U.S.C. §2632
>
> Consumer Representation
> (a) - Compensation for Costs of Participation or Intervention
>
> (1) If no alternative means for assuring representation of electric consumers is adopted in accordance with Subsection (b) and if an electric consumer of an electric utility substantially contributed to the approval, in whole or in part, of a position advocated by such

consumer in a proceeding concerning such utility, and relating to any standard set forth in Subtitle B, such utility shall be liable to compensate such consumer (pursuant to paragraph (2)) for reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of such position in such proceeding (including fees and costs of obtaining judicial review of any determination made in such proceeding with respect to such position).

(2) A consumer entitled to fees and costs under paragraph (1) may collect such fees and costs from an electric utility by bringing a civil action in any State court of competent jurisdiction, unless the State regulatory authority...has adopted a reasonable procedure pursuant to which such authority...

A. Determines the amount of such fees and costs, and

B. Includes an award of such fees and costs in its order in the proceeding.

(b) Alternative Means - Compensation shall not be required under Subsection (a) if the State, [or] the State regulatory authority...has provided an alternative means for providing adequate compensation to persons -

(1) Who have, or represent, an interest

A. which would not otherwise be adequately represented in the proceeding,....

(Emphasis added)

Congress provided that each state through its utility commission could select the most suitable option from these three choices. If the state or state utility commission establishes an "alternative means" program (option 1), the state assumes

responsibility to administer and provide a source of funds for intervenor compensation. The state utility commission, by awarding intervenor compensation in a PURPA case (option 2); or by deferring to the Act's civil award provision (option 3), effectively chooses to pass the costs of PURPA intervenor funding on to the individual electric utilities in the state.

The civil action procedure is appropriate where no state "alternative means" exists and/or the commission does not make direct awards either as a policy choice or due to limited statutory authority.

The simple test for determining if the state-sponsored "alternative means" program satisfies the requirements of both §2632(a) and (b) is to determine whether the state program provides compensation and assures the adequate representation of consumers whose interests would otherwise not be represented.

Not surprisingly, most states which have adopted a PURPA intervenor compensation procedure have decided that existing state-provided consumer representation did not fulfill the Act's "alternative means" requirements and have chosen not to establish new PURPA-based "alternative means" programs at state expense. Instead, they have established that the reasonable costs of consumer intervention must be paid by the utilities through direct awards. See California, Re Costs of Participation in Elect: Ratemaking Proceedings, 37 PUR 4th 259 (1980); Maine, Re Costs of Participation in Comm'n. Proceedings on PURPA, 37 PUR 4th 280 (1980); Alaska, In Re Procedure for Compensation of Electric

Consumers, 38 PUR 4th 127 (1980). South Dakota, Kansas, West Virginia and Minnesota have established similar procedures.

The Michigan Public Service Commission identified no applicable "alternative means" program within the state. But unlike most states, Michigan does not make direct awards in its rate orders. Instead, the Commission explicitly stated that eligible intervenors must bring a civil action in court against the utility as provided in §2632(a)(1). Proceedings to Consider Electric Ratemaking Standards, 35 PUR 4th 339, 343 (Mich. P.S.C. 1980). (The Utah Public Service Commission recently directed such an action in another case involving Utah Power. See Ex. 1). The Michigan Commission acknowledged that it could adopt an alternative means procedure and it considered the Act's direct award procedure, but concluded that it had no statutory authority under state law to award expenses in an administrative proceeding. Courts in Idaho and Montana have also denied commission authority to award fees and required court action. See Idaho Power Co. v. Idaho Public Utilities Commission, 639 P.2d 442 (Idaho 1981), and Montana-Dakota Utilities Company v. Montana Dept. of Public Service Regulation, 50 PUR 4th 481 (Mont. Dist. Ct. 1982).

Since it is undisputed that Utah does not make direct awards, only if an "alternative means" exists can Utah Power avoid payment.

II. UTAH HAS NO "ALTERNATIVE MEANS" PROGRAM; THEREFORE A CIVIL ACTION IS AVAILABLE TO CONSUMER INTERVENORS

An "alternative means" program which complies with the requirements of 16 U.S.C. §2632 (a) and (b) precludes a civil action for intervenor compensation.

Of PURPA's three intervenor compensation procedures, the state-sponsored "alternative means" program is the most difficult to neatly define. This is in part because Congress left much of the design of such programs to the states. Unlike the easily conceptualized civil action and direct award options, the "alternative means" referred to in the Act is characterized as a state-developed program which must meet certain basic requirements, while the actual form and operation of the program is left to the discretion of the state.

The "alternative means" term is first found in §2632(a) in the context that, if the state adopts an "alternative means for assuring representation of electric customers," the utility is relieved of the responsibility to provide compensation for consumer intervention. (Emphasis added.) The "alternative means" is further defined in the next subsection of the Act as: "an alternative means for providing adequate compensation to persons" who, "(1) have or represent an interest - (A) which would not otherwise be adequately represented and, (B) representation of which is necessary for a fair determination in the proceeding" §2632(b)(1)(A) and (B). (Emphasis added.)

These two requirements are confirmed by the legislative history, H.R. Conf. Rep. No. 95-1750, reprinted in 1978 U.S. Code Cong. and Ad. News, 7797, 7816-7:

> ...The purpose of this section is to prcvide a mechanism to assure that the interests of electric consumers will be represented at the State level in proceedings dealing with standards set forth in Subtitle B. The mechanism chosen for this purpose is either of two options. One makes the utility liable to provide compensation directly to electric consumers who substantially contribute to the approval in whole or in part, of a position advocated by the consumer in a proceeding concerning the utility relating to any standard set forth in this title by creating a right of action against the utility. The second option provides that a State or State regulatory authority or non-regulated utility may have a program to otherwise provide adequate compensation to persons described in Subsection (b). Such a program may include an adequately funded office of public counsel which adequately represents the interests of persons described in paragraphs (1) and (2) of Subsection (b). (Emphasis added.)

The Report makes it very clear that a state providing an "alternative means" program must include intervenor funding as part of the program. This section of the report refers first to the state-provided adequate compensation to persons described in Subsection (b). It then adds that such a program of compensation might include an office of public counsel which, as part of its responsibility, represents the interests of the public generally or a particular class of consumers specifically, provided that the agency also encouraged otherwise unrepresented consumers to participate in PURPA proceedings and compensated those eligible for the reasonable costs of their participation.

The best analysis of the requirements of an "alternative means" program was made by the California Public Utilities Commission in Re Costs of Participation in Electric Ratemaking Proceedings, 37 PUR 4th 259, 264 (Cal. P.U.C. 1980). California found that no existing state office, including the Attorney General and in particular its own staff, offered an "alternative means" program for two fundamental reasons. First, while a state agency or utility commission staff could advocate for the public interest broadly defined, it could not always adequately represent specific consumer interests. Second, the range of interests in any given hearing could not be represented by one office alone. The Commission stated:

> The Commission cannot, however, say that in all cases the staff will adequately represent the persons described in Section 122(b) [2632(b)]. As noted above, the staff is charged with representing the broad public interest. Often, this will be a compromise of many interests, including those of the utility. The staff may conclude that the public interest is not the same as the interests of those consumers described in Section 122(b). Further, there are many differing and often competing consumer interests in any proceeding considering PURPA issues. Any staff would be hard pressed to represent all of these interests.

(Emphasis added.)

In Utah the Division of Public Utilities, whose duties are spelled out in Utah Code Ann. §54-4a-1 et seq., like the staff of the California Commission, is charged with promoting many

competing interests, including maintaining the financial health of the utilities. It certainly cannot represent consumer interests. Nor can the Commission's own small staff.

The Alaska Public Utility Commission also decided to order direct awards of intervenor funding in PURPA proceedings. In Re Procedure for Compensation of Electric Consumers, 38 PUR 4th 127, 132 (1980). That Commission first concluded that the federal act required that any "alternative means" program must include a means for adequately compensating consumer intervenors, and a state law department (either the Attorney General or the Utility Commission) is a deficient "alternative means" program because its representation of the public interest is not necessarily identical to that of an individual or class of consumers.

This is the key to understanding why the existence of the Committee of Consumer Services, established by statute at Utah Code Ann. §54-10-1 et seq. to represent residential consumers and small commercial enterprises, is not an alternative means in this case. First, it is not authorized, nor is any other part of state government, to award compensation to consumers for participation in utility cases and thus fails to meet one prong of the test. In addition, its counsel in this case, James Barker, described several restrictions on the actual operation of the Committee of Consumer Services which preclude its being the "alternative means" here: the Committee is not

adequately funded (R. 167-8); sometimes conflicts of interest between segments of the population the Committee is authorized to represent preclude effective representation of all interests (R. 172); and the position advocated by Plaintiffs here seemed inconsistent with Committee policy in this case (R. 175). In addition, the Committee's participation in this hearing was passive and cannot be considered "adequate representation" of low-income and senior citizen intervenors. For all these reasons, the Committee's existence should not bar the award of fees.

The only case which squarely addresses the "alternative means" question is POWER v. Washington Water Power Co., 662 P.2d 374 (Wash. 1983). In that case a sharply divided Washington Supreme Court held 5-4 that the minimal participation in a utility rate case by a special assistant attorney general who merely assisted members of the public in testifying precluded the award of PURPA fees to a consumer group who actively participated in the same case. The majority held that since the assistant attorney general was 1) independent of the regulatory authority; 2) empowered to appear and participate in any regulatory or judicial proceeding; 3) authorized to retain outside experts and 4) authorized to hire and retain sufficient staff, the requirements for PURPA's "alternative means" were met.

The dissenters discussed the question of adequate representation and concluded that the focus should be on the

actual authority to hire experts and staff and whether this was done. Since in that specific case there was no such authority, they would have awarded compensation.

Public policy in Utah should not require consumers who successfully contribute to a PURPA-related PSC decision to go without compensation when the Committee of Consumer Services merely appears but takes no active role in the decision or when it does not appear at all or appears and takes a position contrary to other consumers. The California and Alaska PUC analyses about the defects in such a system certainly apply here. Consumers should be reimbursed unless there is a viable alternative means which adequately represents their interest in a particular case and provides compensation. That simply did not occur here.

III. PLAINTIFFS SUBSTANTIALLY CONTRIBUTED TO THE PUBLIC SERVICE COMMISSION ORDER BELOW

In addition to commencing this action, Plaintiffs made certain recommendations which were presented primarily through the testimony of witness Bill Biggs. In his testimony he stressed (1) the need for customers' actual receipt of notice of termination of service (Tr. 33-34), (2) more definite regulations controlling and making mandatory the customer option to make deferred payments on deposits (Tr. 32) and delinquent accounts (Tr. 35-36), and (3) mandatory notification of termination to the

occupant of a residence where the occupant is not the account holder (Tr. 39-40). All of this testimony pertained to the PURPA standard on termination of service, 16 U.S.C. §§2623(b)(4) and 2625(g).

Significant changes occurred in both Rule 5 (Deferred Payment Agreement) and Rule 6 (Termination) of the Utah Public Service Commission's Rules as a result of Plaintiffs' recommendations. First, the provision for a third-party designee to receive notification of termination at the request of the account holder was made available to all residential users, Rule 6(f)(3). Second, the regulations now include the requirements of a "good faith effort" on the part of the utility to notify the account holder or an adult member of the household within 48 hours of the scheduled termination. Third, the deferred payment option was made a right of the customer rather than a discretionary action of the utility, Rule 5(a)(1). This deferred payment option covers not only delinquent balances, but reconnection charges and security deposits as well, Rule 4(a)(4). Fourth, the new regulations include a provision for the protection of an occupant of a residence who is not the account holder who is ill, Rule 6(c). Finally, a provision requires notice to the occupant of the termination of service at the request of a landlord. Rule 6(h). Each of these changes occurred solely at Plaintiffs' urging, are substantial, and demonstrate the magnitude of Plaintiffs' contribution to the proceedings.

CONCLUSION

Plaintiffs are entitled to fees for prosecuting this case and this appeal by virtue of PURPA since they substantially contributed to the decision in this matter and Utah has established no alternative means to represent consumers and reimburse them. The lower court decision should be reversed.

DATED this 23rd day of October, 1984.

UTAH LEGAL SERVICES, INC.
Attorneys for Plaintiffs/
Appellants

By: Bruce Plenk
BRUCE PLENK

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Appellants' Brief, first class, postage prepaid, to Robert Gordon and David Lloyd, Attorneys for Defendant, at P. O. Box 899, 1407 W. N. Temple, Suite 340, Salt Lake City, Utah 84110, this 24th day of October, 1984.

Joan Luna

EXHIBIT 1

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of the SALT LAKE COMMUNITY ACTION PROGRAM AND UTAH ISSUES for Prohibition on Winter Termination of Gas and Electric Utility Service.	CASE NO. 82-999-17 ORDER DENYING MOTION FOR ATTORNEYS' FEES

ISSUED: April 11, 1984

By the Commission:

By Motion dated May 23, 1983, the Salt Lake Community Action Program and Utah Issues ("Petitioners") requested this Commission to award its attorneys' fees in the amount of $5,212.50. This Motion, based on Section 122 of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 2632 (1979), requested compensation for the efforts of Bruce Plenk, an attorney with Utah Legal Services, Inc., for representing Petitioners in the above-described case before the Public Service Commission.

Utah Power and Light Company, Mountain Fuel Supply Company, and Utah Gas Service Company, three utilities that were parties to the proceedings, opposed the Motion for Attorneys' Fees.

NOW, THEREFORE, the Commission having carefully considered the arguments in the case and being fully advised concerning the relevant law, issues the following Findings and Conclusions and Order based thereon:

FINDINGS AND CONCLUSIONS

1. Petitioners are not seeking reimbursement of attorneys' fees from any gas utility company. Their Motion for award of attorneys' fees is directed at Utah Power and Light Company and any other affected electric utility companies under the provisions of Section 122 of PURPA.

2. Unlike Mountain Fuel Supply Company, Utah Power and Light Company has not been a primary opponent on the request for a moratorium on winter termination of gas and electric utility service and this Commission is unwilling to require that Utah Power and Light pay the attorneys' fees sought.

3. There exists an alternative mechanism for obtaining the attorneys' fees sought herein by Petitioners through the District Court.

Based upon the foregoing, the Commission makes the following

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the Motion for Attorneys' Fees requested by the Salt Lake Community Action Program and Utah Issues and Mr. Plenk, as their attorney, be and is hereby denied.

DATED at Salt Lake City, Utah, this 11th day of April, 1984.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ David R. Irvine, Commissioner

/s/ James M. Byrne, Commissioner

Attest:

/s/ Georgia B. Peterson, Secretary